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ents, entered into an agreement of partnership, whereby the three purchased the land. Title to the premises was for convenience taken in the name of one of the respondents. On their discovery that appellant had misrepresented to them the purchase price of the premises, respondents, after giving appellant an opportunity to sell the premises at an advance, excluded him from participation in the management of the property. Held, that as appellants elected to repudiate the contract on the ground of fraud instead of affirming the same, and as equity treats the contract as void ab initio, the premises which were the subject-matter of the partnership contract, together with all other partnership property, must be ordered sold, so that the parties could be placed in status quo as far as possible, and the exclusion of appellant and return of his investment was unauthorized.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 836.]

**3. Equity (§ 427 (2)\*)—Pleading—Prayer.**—Where both appellant and respondents filed bills for relief growing out of differences with respect to a partnership, and a dissolution of the partnership was the appropriate relief, such relief should be granted, though it was not the special relief prayed for by the parties.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 132; 8 Va.-W. Va. Enc. Dig. 221.]

**4. Partnership (§ 305\*)—Dissolution—Division of Capital.**—Neither party to a partnership on dissolution has the right to compel a division in kind or require the other to accept what, according to a valuation, his interests may be worth, but each is entitled to have the property sold and converted into money.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 886.]

Appeal from Corporation Court of Staunton.

Bill by Z. M. K. Fulton and another against T. M. Gathright, consolidated with a bill by the latter against the former. From the decree for Fulton and another, Gathright appeals. Reversed.

*J. M. Perry*, of Staunton, and *Geo. A. Revercomb*, of Covington, for appellant.

*H. H. Byrd* and *Wm. M. McAllister*, both of Warm Springs, for appellees.

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NORFOLK & W. RY. CO. *v.* SPATES.

Nov. 15, 1917.

[94 S. E. 195.]

**1. Railroads (§ 482 (4)\*)—Fires from Engines—Evidence Admissible.**—Evidence that other engines of defendant railroad at other

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

times in the past had thrown sparks and cinders, and in some cases set fire at or near the locality of the buildings of plaintiff, for the burning of which damages were sought, was admissible, in view of Acts 1908, c. 269, making railroads liable, regardless of use of proper spark arresters.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 134.]

**2. Trial (§ 29 (2)\*)—Remarks of Court—Ruling on Evidence.**—The court's remark, in ruling that evidence that other engines of defendant railroad at other times in the past had thrown sparks was admissible, "I think it admissible, but not on the ground of showing that the engines were defective, but showing that at that point the railroad company had thrown out fire on other occasions, and therefore that it is possible for it to have thrown out fire at this time," was not unfavorable to defendant, because using the word "possible."

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 451.]

**3. Appeal and Error (§ 1046 (5)\*)—Remarks by Court—Harmless Error.**—In view of the admittedly correct instruction on the point, and as it does not appear affirmatively from the record that the jury was misled or could have rendered a different verdict, the error of the court, if any, in holding that evidence of prior fires from defendant railroad's engines, was admissible to show that it was possible for the engines at the time in question to have thrown out sparks, was harmless.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 597, 598.]

**4. Trial (§ 296 (3)\*)—Misleading and Contradictory Instructions.**—The instructions that the burden of proof is upon plaintiff to show that defendant set out the fire, that it is not sufficient for the plaintiff to show that it was possible for defendant to have started the fire, but it must appear that there was no other probable cause for the fire, was not contradictory in terms, or calculated to mislead the jury into believing that it was instructed that the railroad company was liable, unless it appeared from the evidence that there was no other cause for the fire, when read in connection with the instruction that, before the plaintiff could recover, he must show more than a mere probability that the property was destroyed by sparks of fire or cinders set out by an engine of defendant company.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 729, 744.]

**5. Trial (§ 260 (3)\*)—Instructions Already Given.**—Defendant's requested instruction that the burden of proving that the fire was caused by the engine or engines of defendant company is on the plaintiff, and must be proven by preponderance of all the testimony, and cannot be presumed from the happening of the fire, that it is incumbent on plaintiff to show how and why the fire occurred, and that it cannot be left to the jury to determine by conjecture, guess,

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or random judgment, or from mere supposition, was substantially and fully covered by the instructions that, if plaintiff sustained damage by a fire occasioned by sparks, cinders, or coals emitted or thrown from an engine of defendant, plaintiff was entitled to recover the damages so sustained at the date of the fire, that the burden of proof is upon the plaintiff to show that defendant set out the fire, and that it is not sufficient to show that it was possible for defendant to have started the fire, but it must appear from the evidence that there was no other probable cause, and that, before defendant can recover, the evidence must be such as to show more than a mere probability that the property was destroyed by sparks of fire or cinders from an engine of defendant.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 742.]

**6. Trial (§ 260 (1)\*)—Instructions Already Given—Refusal.**—Where the jury has been fully instructed on a given matter, it is not error to refuse other instructions on such matter, though correct.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 742.]

**7. Railroads (§ 484 (2)\*)—Fires—Misleading Requested Instruction—Refusal.**—The provision of defendant's requested instruction, "Nor can the jury presume, from the happening of the fire, that it was caused by the defendant company's engine or engines," while stating a correct proposition of law, would have been misleading, where plaintiff was not relying upon such presumption, but had other evidence on that point.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138.]

**8. Trial (§ 252 (9)\*)—Instructions—Evidence to Support.**—Defendant's requested instruction, that if the fire resulted from one of two causes, for one of which defendant is liable, but not for the other, plaintiff cannot recover, nor can he recover if it is just as probable that the fire was caused by the one as by the other cause, was properly refused, where the evidence showed only causes for which defendant was liable under Acts 1908, c. 269 ("Featherstone Act").

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 718.]

**9. New Trial (§ 70\*)—Grounds—Sufficiency of Evidence.**—In action for damages for fire alleged to have been caused by sparks from defendant railroad's engines, held, under evidence, that the court properly refused to set aside the verdict for plaintiff and grant a new trial.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 454.]

Error to Circuit Court, Clarke County.

Action by Annie L. Spates against the Norfolk & Western

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*Roy B. Smith*, of Roanoke, and *Marshall McCormick*, of Berryville, for plaintiff in error.

*Ward & Larrick*, of Winchester, for defendant in error.

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BOARD OF SUP'RS OF CULPEPER COUNTY *v.* COONS.

COONS *v.* BOARD OF SUP'RS OF CULPEPER COUNTY.

Nov. 15, 1917.

[94 S. E. 201.]

**1. Counties (§ 75 (1)\*)—Compensation of Clerk—Powers of Supervisors.**—The board of supervisors has no discretion to refuse to act in fixing the compensation and other allowances of a county clerk within the limits prescribed and allowed by law, or, if it acts, to impose a condition or conditions upon the payment of such compensation on the ground that the clerk has not performed, or is not performing, his duties, the position of county clerk not being created by the board, but by law.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 667, 682.]

**2. Counties (§ 74 (2)\*)—Clerk—Interest on Salary.**—The county clerk was not entitled to interest on unpaid balances of his salary and allowances fixed by the board of supervisors.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 682.]

**3. Counties (§ 74 (2)\*)—County Clerk—Additional Compensation to Salary.**—Plaintiff was elected and qualified as county clerk of the circuit court in 1893, and has continued in office by successive elections and qualifications to the present time. Code 1887, § 3184, as amended by Acts 1891-92, c. 471, provided that the court of every county wherein a general index to the deed books, will books, judgment lien docket books in the clerk's office has not been provided and has become so defaced as to render another general index necessary, or wherein the index does not show the Christian names or the initials of the grantor, etc., may, in its discretion, appoint a suitable person to make a general index of such deed books in the full names of the grantor and grantee, and a general index to the will books, judgment lien docket books, and shall certify a proper allowance to the person so appointed as compensation. It is further provided that it shall be the duty of the clerk of every court to index all the recorded deeds, wills, docketed judgments, as well in the general index as in the deed books, etc. Pursuant to said section, the circuit court entered an order by which plaintiff was elected and ap-

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